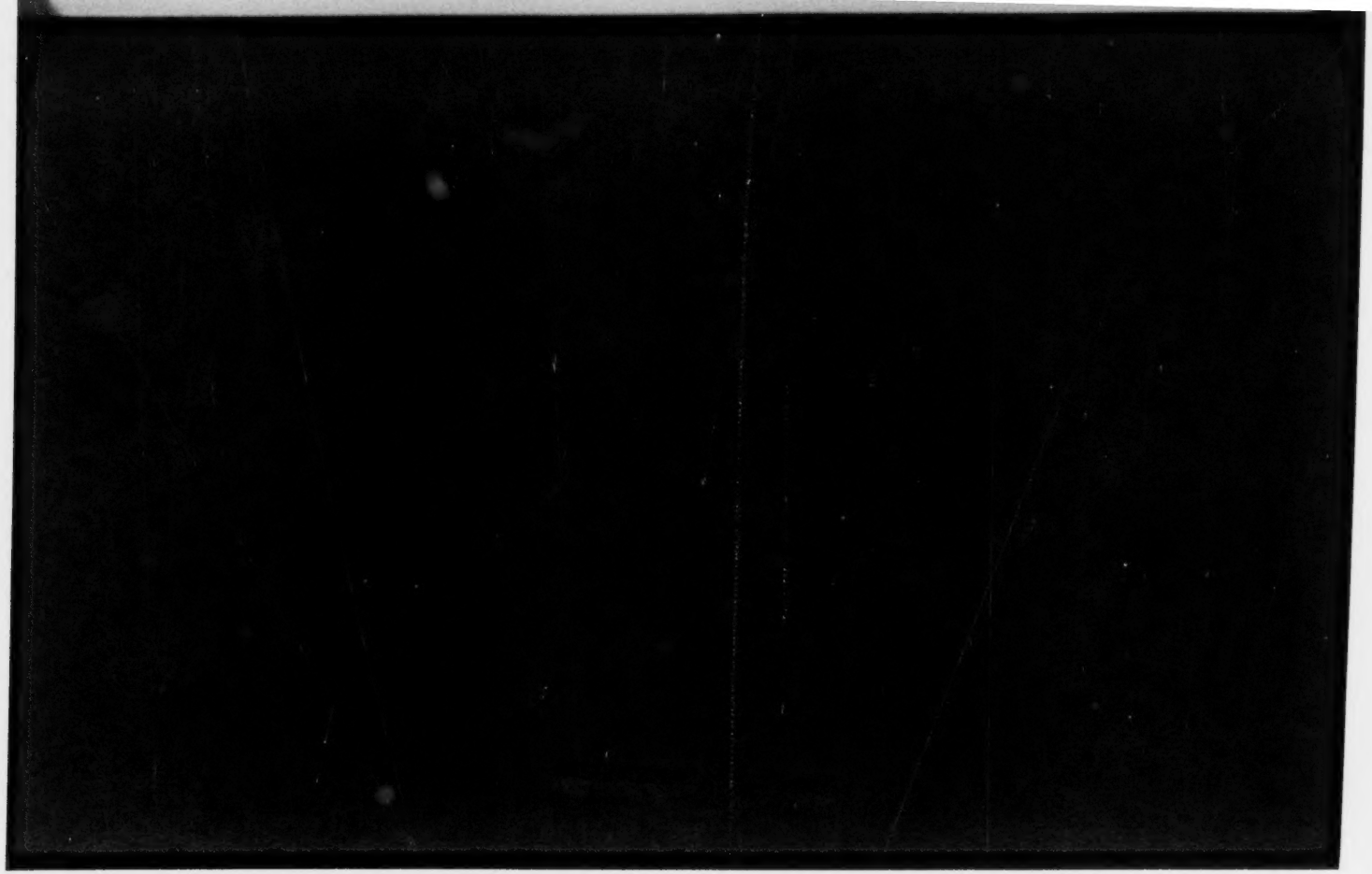

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CITATIONS

257891—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 348

THE OREGON SHORT LINE RAILROAD COMPANY, A CORPORATION, AND SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court and the circuit court of appeals are not reported but may be found in the record at pages 36–43 and 56–69, respectively.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered June 27, 1940 (R. 70). The petition for a writ of certiorari was

filed August 20, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Act of September 1, 1888, granted a railroad right of way through an Indian reservation and required the railroad to execute a ten thousand dollar bond to the United States "conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes". The question is whether the Act imposes liability independent of negligence for damages caused by the operation of trains through the reservation.

STATUTE INVOLVED

The pertinent provision of the Act of September 1, 1888, c. 936, Sec. 14, 25 Stat. 452, is set forth in the Statement at pages 3–4, *infra*.

STATEMENT

The United States, on behalf of the Shoshone and Bannack tribes of Indians, brought this suit pursuant to Section 14 of the Act of September 1, 1888, c. 936, 25 Stat. 452, 456, and on a bond given thereunder, to recover damages in the sum of $10,000 for the killing and maiming of four Indians (R. 2–20).

The Fort Hall Indian Reservation was established for the Shoshone and Bannack Indians by

the Treaty of July 3, 1868, 15 Stat. 673. This treaty provides in part:

> And the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians * * *.

Neither the Oregon Shortline Railroad Company nor its predecessor, the Utah and Northern Railroad Company, was one of the persons authorized to go upon the lands designated by the treaty (R. 4–5). Nevertheless, the Utah and Northern Railroad Company constructed its line through the Fort Hall Indian Reservation without having first obtained a right of way.

To adjust the rights of the tribe and to enable the railroad company to acquire the necessary right of way through the reservation, the United States and the Shoshone and Bannack tribes entered into an agreement which was accepted and ratified by Congress by the Act of September 1, 1888, c. 936, 25 Stat. 452. Section 14 of the Act provides:

> That said railway company shall execute a bond to the United States * * * in the penal sum of ten thousand dollars, for the

> use and benefit of the Shoshone and Bannack tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their live stock, in the construction and operation of said railway, or by reason of fires originating thereby; the damages in all cases * * * to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States attorney in the name of the United States * * *.

The Oregon Shortline Railroad Company and St. Paul-Mercury Indemnity Company executed a bond as contemplated by the foregoing section (R. 8–10). The bond recites the statutory grant of the right of way and the pertinent part of Section 14, and further provides (R. 9):

> Now, therefore, if the said Oregon Shortline Railroad Company, its successors or assigns, shall make full satisfaction for any and all such deaths, injuries, or damages, then this obligation shall be null and void; otherwise, to remain in full force and effect.

On January 19, 1938, at a railroad crossing within the Fort Hall Reservation, a train operated by the defendant railroad collided with an automobile occupied by four Indians of the Shoshone and Bannack tribes (R. 11). Three of the Indians were

killed and the fourth was injured (R. 12). This suit was filed after both the railroad and the surety on its bond failed to pay the damages upon demand (R. 12).

The United States took the position that under the statute and bond the liability of the railroad and its surety was not dependent upon negligence. The district court rejected this contention and dismissed the complaint on the ground that it did not state a claim upon which relief could be granted. (R. 36–44.)

The Government appealed and the judgment of the district court was reversed (R. 70). The court of appeals held that it was clear from the statute and surrounding circumstances that it was the purpose of Congress to place upon the railroad rather than the aborigine the full burden of all losses occasioned by the operation of trains through the reservation (R. 56–67). One member of the court took the position that it was unnecessary to construe the statute but concurred in the result on the ground that the Government, under the terms of the bond, was not required to prove that the damages resulted from the railroad's negligence (R. 67–69).

ARGUMENT

1. The court of appeals correctly held that, in their popular sense, the words of the statute "reasonably import the broad purpose of saving the Indians harmless, or of insuring them against loss

even though occasioned by inevitable accident" (R. 60). Under the statute the railroad and its surety are required to make "due payment of *any and all damages which may accrue* by reason of the killing or maiming of any Indian * * *" (italics supplied). Clearly, the terms of the statute do not limit liability to damages resulting from negligent operation of the railroad.

Petitioners recognize (p. 8) that Congress is presumed to use words with their known and ordinary meaning. Nevertheless, they assert (p. 16) that the word "damages" means "compensation to be recovered for a wrongful act" and argue that they therefore are not liable in the absence of negligence or other wrongful act. This argument assumes that Congress used the word in a highly technical sense and ignores the fact that the ordinary meaning of damage is simply "loss due to injury" or "injury or harm to person, property, or reputation." Webster, New International Dictionary (2d ed. 1936), p. 664.

2. Even if the statute were ambiguous the circumstances surrounding its passage would, as the court of appeals pointed out (R. 61–67), compel the conclusion that it was the purpose of Congress to impose liability independent of the railroad's negligence.

Prior to 1888, the year in which the Act in question was passed, statutes had been enacted in many states imposing absolute liability on railroad com-

panies for damages caused by fire.[1] Also, a number of states had adopted statutes imposing absolute liability for the killing of livestock and injuries to passengers.[2] Thus, when it granted a right of way through the Fort Hall Reservation, Congress had ample precedent for requiring the railroad to accept unconditional responsibility for all losses to Indian life and property.

The report of the House Committee on Indian Affairs, referring to the bill which became the 1888 Act, states (R. 20):

> Provision is made for indemnification by the railway company to the Indians for killing or maiming the Indians or their stock; also for fencing in the railway track where it runs through the improved lands of the Indians. *We believe, in short, that every interest of the Indians has been jealously guarded and protected.* [Italics supplied.]

The jealous safeguarding of the Indians, "could hardly be thought to lie in the mere exaction of security for the payment of 'legal' damages, recoverable only on proof of negligence" (R. 66). There is no indication that Congress was concerned with the solvency of the railroad. In fact an earlier statute which granted to the same railroad a

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[1] See *St. Louis & San Francisco R'y* v. *Mathews*, 165 U. S. 1, containing a history and summary of the various statutes then in effect. See also note (1928) 53 A. L. R. 875–879.

[2] See *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512, and note (1928) 53 A. L. R. 879–882.

right of way over a different part of the same reservation required no bond, but the grant was to be forfeited in the event the railroad failed to "pay any and all damages" sustained by the Indians. Act of July 3, 1882, c. 268, Sec. 3, 22 Stat. 148.

The Act of 1888 must be construed to protect the dependent people for whose benefit it was passed. Cf. *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89; *Choate* v. *Trapp*, 224 U. S. 665, 675. When the statute is considered in its setting it is apparent that Congress intended to impose liability independent of the railroad's negligence and thus afford the Indians a measure of protection commensurate with the increased hazards to which they were subjected.

3. Petitioners assert (p. 9) that this case presents an important question which, unless settled by this Court, will be frequently recurring. However, it is evident that the question is not important. This seems to be the only case which has arisen in the fifty-two years since the statute was passed. Moreover, the statute which petitioners ask this Court to construe is not one of general applicability but affects only the fifteen mile right of way here involved.

CONCLUSION

The decision of the court of appeals is correct and presents neither a conflict of decisions nor a

question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.
ROBT. E. MULRONEY,
Acting Head, Lands Division.
CHARLES R. DENNY,
Attorney.

SEPTEMBER, 1940.

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